

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Case No. 01-01139  
. .  
W.R. GRACE, . USX Tower, 54th Floor  
Debtor. . 600 Grant Street  
Pittsburgh, PA 15222  
. .  
. May 24, 2004  
..... 2:03 p.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY COURT JUDGE

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1           THE COURT: Good afternoon. This is the matter of  
2 W.R. Grace, Bankruptcy No. 01-133 -- I'm sorry -- 1139, pending  
3 in the District of Delaware. The parties I have set to appear  
4 by phone are David Caracoff (phonetic), Carol Iancu, I-a-n-c-u,  
5 Scott Dana, Theodore Tacanelli, Edward Westbrook, Neal  
6 Levitsky, James Harmon, Sandy Esserman, David Parsons, Jennifer  
7 Skollard, Jeff Wisler, Keri Mumford, Michael Westowski, Lewis  
8 Kruger, Arlene Kruger (sic), Frank Monaco, Kevin Mangin and  
9 Frank Perch. Are there changes to that list?

10           MR. SCOTT: Yes, ma'am.

11           MR. KRUGER: Your Honor, just to correct, it's Arlene  
12 Krieger, not Kruger.

13           THE COURT: On, Krieger? Pardon me just one second.  
14 Okay.

15           MR. SCOTT: And Darrell Scott, Your Honor, of Lukins  
16 and Annis, special counsel to ZIA claimants.

17           THE COURT: I'm sorry. Special counsel for whom?

18           MR. SCOTT: Zonelite Attic Insulation.

19           THE COURT: Okay.

20           MR. SCOTT: Thank you.

21           THE COURT: Thank you.

22           MR. DAVIS: Michael Davis is on for National Union.

23           THE COURT: All right. Just one minute. All right.  
24 Anyone else?

25           MS. CARMICHAEL: Yes, Your Honor. Linda Carmichael,

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1 for the ACE entities.

2 THE COURT: Are you folks on a -- on speaker phones?  
3 If you are, please pick up the lines. It's very hard to hear  
4 and when I turned the speakers up before, we were getting some  
5 pretty awful feedback. Okay. I've got Ms. Carmichael's. Who  
6 else?

7 MR. MARTIN: Tom Martin, for Neal Levitsky.

8 THE COURT: All right.

9 MR. MARTIN: And Stuart Cohen.

10 MR. COHEN: Also on the same case, Your Honor, from  
11 Conroy, Simberg --

12 THE COURT: I'm sorry. I know somebody's speaking.  
13 I can't hear you.

14 MR. COHEN: My name is Stu Cohen, Your Honor. Tom  
15 Martin just announced my appearance, also on the Kane matter,  
16 for Timothy Kane.

17 THE COURT: Also on the Kane matter?

18 MR. COHEN: Correct.

19 THE COURT: All right. Mr. Cohen, you're really  
20 going to have to speak up. We can hardly hear you.

21 MR. COHEN: That's okay, Your Honor. I won't be  
22 speaking very much.

23 THE COURT: All right. Anyone else?

24 MS. COBB: Tiffany Cobb, from the law firm, Vorys,  
25 Sater, Seymour and Pease.

1 THE COURT: I'm sorry. Who -- I -- who were you for?

2 MS. COBB: I'm not at liberty to disclose my client.

3 THE COURT: I beg your pardon?

4 MR. BERNICK: Then you're not at liberty to enter an  
5 appearance.

6 MS. COBB: I'm just attending to listen in.

7 THE COURT: All right. Anyone else?

8 MS. DeCRISTOFARO: Yes, Your Honor. Elizabeth  
9 DeCristofaro, from Ford, Marrin, for Continental Casualty.

10 THE COURT: I got Elizabeth Cristofararo (sic). I  
11 didn't hear what else you said.

12 MS. DeCRISTOFARO: The law firm of Ford, Marrin.

13 THE COURT: All right.

14 MS. DeCRISTOFARO: For Continental Casualty.

15 THE COURT: All right. Anyone else? Okay. I'll  
16 take entries of appearances in court, please. Just one second  
17 here. Okay. Good morning.

18 MR. BERNICK: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MR. BERNICK: David Bernick, for the debtor, and Ms.  
21 Jan Baer, and obviously, Mr. Restivo, who needs no introduction  
22 here, but he's also here for the debtor.

23 THE COURT: Good morning.

24 MR. BECKER: Good afternoon, Your Honor. Gary  
25 Becker, from Kramer, Levin, Naftalis and Frankel, representing

1 the equity committee.

2 THE COURT: Good morning.

3 MR. SAKALO: Good afternoon, Your Honor. Jay Sakalo,  
4 Bilzin, Sumberg, Baena, Price and Axelrod, on behalf of the  
5 property damage committee. My colleague, Scott Baena, is on  
6 the telephone.

7 MS. ESKIN: Marla Eskin, Campbell, Levine, for the  
8 asbestos personal injury claimants.

9 MR. LOCKWOOD: Peter Lockwood, Caplin and Drysdale,  
10 for the ACC.

11 MR. PERNICONE: Good afternoon, Your Honor. Carl  
12 Pernicone, from Wilson, Elser, for Royal Sun Alliance.

13 MR. COHN: Jacob Cohn, Your Honor, Cozen, O'Connor,  
14 Federal Insurance Company.

15 THE COURT: You'll have to use the microphone. We  
16 won't be able to hear you back there. I'm sorry.

17 MR. D. COHN: That's all right, Your Honor. Daniel  
18 Cohn, for the Libby claimants, firm of Cohn, Khoury, Madoff and  
19 Whitesell, in Boston.

20 MR. LONGOSZ: Good afternoon, Your Honor. Ed  
21 Longosz, from Maryland Casualty, from the law firm of Eckert,  
22 Seamas.

23 THE COURT: Mr. Bernick.

24 MR. BERNICK: Yes.

25 THE COURT: I have entered orders on agenda items

1 number one, three, four and five. I know that a COC was filed  
2 on number two, but I have some questions about number two. So  
3 I have not entered that order. So I believe that --

4 MR. BERNICK: So you -- I'm sorry, Your Honor. You  
5 said you've entered orders on?

6 THE COURT: One, three, four and five.

7 MR. BERNICK: Four -- one, three, four and five. And  
8 then I guess that would only leave ten and number two. If you  
9 have questions regarding the order in item two, I'm sure Ms.  
10 Baer will be able to respond to those questions.

11 THE COURT: All right. I -- actually, I have two.  
12 There is a reference to a contingency fee, but the entire  
13 application process talks about a fixed fee only. So I'm a  
14 little confused. It appears that you're asking for authority  
15 to have a contingency fee applied to certain lease transactions  
16 that were entered into.

17 MS. BAER: That's correct, Your Honor. That's the  
18 only portion of the application where there's a contingency.  
19 That was a part of the overall retention of Deloitte and  
20 Touche, and the only part that is on a contingency and related  
21 to that one specific item, which is the one thing that was not  
22 on their original application when they were retained.

23 THE COURT: Okay. And the other is, the agreement  
24 indicates that Deloitte can assign or subcontract its interests  
25 in I guess the lease arrangement to any other entity without

1 either a motion or a court order, and I'm not sure whether that  
2 refers to the services that Deloitte is performing for the  
3 debtor, because if that's the case I don't think they can  
4 subcontract or assign without court approval.

5 MS. BAER: Your Honor, I don't know what specifically  
6 they're referring to. It's not my understanding that they're  
7 subcontracting or assigning it to anybody. If it makes some  
8 sense, perhaps I can talk to them about striking that out.

9 THE COURT: I think that would be advisable, and give  
10 me a revised certificate of counsel, and then I think I could  
11 enter that order.

12 MS. BAER: I will do that, Your Honor.

13 THE COURT: All right. I'll sign that order when I  
14 get a revised COC, then. Mr. Bernick.

15 MR. BERNICK: Yes. I think with respect to item six,  
16 I think we've reached agreement on that, as well. That is the  
17 motion of Timothy Kane. I think that they have prepared an  
18 order for Your Honor, if I'm not mistaken.

19 THE COURT: All right.

20 MR. LEVITSKY: We have an order -- a proposed order,  
21 Your Honor. We can submit that with certificate of counsel, if  
22 it pleases the Court.

23 THE COURT: You can do that or you did do it, sir?  
24 I'm sorry. I'm having --

25 MR. LEVITSKY: We can do that, Your Honor.

1 THE COURT: You can do it. Fine. What is the  
2 agreement?

3 MR. LEVITSKY: Mr. Cohen, Stuart Cohen, can address  
4 the substance of the agreement.

5 MR. COHEN: Your Honor, if I may, this is Stu Cohen.  
6 Can you hear me okay?

7 THE COURT: Yes.

8 MR. COHEN: This was Mr. Kane's motion to lift the  
9 stay in order to proceed directly against the insurance  
10 proceeds that were available to Grace --

11 THE COURT: Yes.

12 MR. COHEN: -- in this action.

13 THE COURT: Yes.

14 MR. COHEN: We've gone ahead and agreed to allow the  
15 stay to be lifted so that Kane's action may proceed to trial  
16 and/or settlement with the proviso that Kane be limited at the  
17 time the judgment is entered or the settlement is reached to  
18 the pro rata share of policy proceeds that are left available  
19 to satisfy his claim at the time the judgment or settlement is  
20 reached.

21 THE COURT: All right. That's fine. Okay. Who's  
22 going to submit this COC?

23 MR. MARTIN: I shall. This is Tom Martin, from Fox,  
24 Rothschild and Wilmington, Your Honor.

25 THE COURT: All right. Thank you. I will enter that

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1 order when I get it.

2 MR. MARTIN: Thank you.

3 THE COURT: Okay. Mr. Bernick.

4 MR. BERNICK: Yes, Your Honor. I think with respect  
5 to the contested matters, if I can make a suggestion that might  
6 make the process go a little bit more smoothly. Item seven,  
7 which is Docket 5460, pertains to the appointment of a futures  
8 representative, and I think we should proceed with that one  
9 first.

10 But then, rather than proceeding to item eight --  
11 items eight and nine, both of which pertain to the Libby  
12 claimants, it might be appropriate as we're talking about going  
13 forward in the main case also to talk about item 11, which is  
14 Docket 5027 and deals with exclusivity.

15 So our proposal would be to take up item seven, then  
16 11 and then proceed to the Libby matters eight and nine. And I  
17 believe that those will comprise the more substantial matters  
18 yet this afternoon that we really have. I think all the others  
19 will take not quite so much time.

20 THE COURT: All right. That's fine.

21 MR. BERNICK: Okay. If I could begin on the futures  
22 representative, I think that the briefs have laid out the  
23 status before the Court. But let me state first of all that we  
24 did try to file a reply brief. Your Honor suggested that if we  
25 wanted to stand by that request, we would continue the matter.

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1 We're happy to dispose with the reply brief and proceed today.  
2 So we're prepared to argue the merits today.

3           The state of play is that there are three candidates.  
4 All three candidates I know are well known to the Court. No  
5 alternative candidate actually has been proposed. Nor, as I  
6 read the papers, do we really see that there is a substantive  
7 objection to the qualifications of any of the three candidates.

8           Instead, we have three legal issues and I want to  
9 cover them briefly. The first issue is whether it's  
10 permissible to have a futures representative serve in more than  
11 one case. That's the first legal issue that's raised. And  
12 apparently, as you look through the language in the briefs that  
13 raise this issue, part of this is an effort to somehow derive  
14 some learning from the recent recusal litigation relating to  
15 Judge Wolin before the Third Circuit.

16           I think, however, that there really is no learning  
17 from that process that really directly applies to the  
18 application that we have here. First, I should note that the  
19 Third Circuit's decision is yet to become actually final in the  
20 mandate issue. In fact, it's my understanding that there is to  
21 be a motion for a rehearing en banc of that matter. So it may  
22 not be final at the present time.

23           But more tellingly, even that opinion is really not  
24 on point, because the factual circumstances were very  
25 different. The issue in that case was whether somebody who is

1 already a futures representative -- and the papers here  
2 underscore that a futures representative is essentially acting  
3 as an advocate or a representative on behalf of a constituency  
4 -- can simultaneously act as a court-appointed advisor where  
5 there is to be neutrality.

6 THE COURT: I can't see a parity between the Judge  
7 Wolin recusal litigation with the FCR acting as an "independent  
8 advisor," and also serving as an FCR in another case, in this  
9 situation.

10 MR. BERNICK: Yeah. That --

11 THE COURT: If that's the case, and I need to not  
12 consider people who have represented the same party, then I'm  
13 afraid that the asbestos plaintiffs' committee probably needs  
14 new counsel. In this case probably not the trade committee,  
15 but other committees in various cases will also need new  
16 counsel.

17 So if they want to pursue this objection I guess I'll  
18 consider it, but folks, understand the consequences. I've said  
19 before, what's good for the goose is good for the gander.

20 MR. BERNICK: I'm therefore, not -- in light of Your  
21 Honor's comments I'm not going to spend real time on this,  
22 unless it's necessary in response. I would venture to say that  
23 if Your Honor takes a look at the many cases that have been --  
24 have dealt with this matter, that is, the appointment of a  
25 futures representative, they consistently look to either

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1 Section 327 -- 327(a) or Section 101 for the test about whether  
2 there is a conflict of interest.

3 As you know, that's an actual disinterest in the  
4 standard. It requires that there be an actual conflict. As  
5 the U.S. Trustee has pointed out here, there is no actual  
6 conflict. And even if you were to look at a more permissive  
7 appearance of conflict or appearance of impropriety standard,  
8 we just don't see it here.

9 The fact that different representatives or the same  
10 person acting as a representative in different cases might  
11 ultimately take a different, substantive position is, first of  
12 all at this point, a matter of speculation, but in any event,  
13 would lead to no consequence that would give rise to a  
14 conflict.

15 For the very reason that the representative stands in  
16 the shoes of his or her constituency, the only constituency  
17 that's bound by the representative statements is the  
18 constituency in that case. So there's no sense in which  
19 there's an overlap of the constituencies.

20 The so-called futures with respect to one case are  
21 different from the futures with respect to another. So we  
22 don't see that there's even an appearance of impropriety  
23 problem.

24 THE COURT: Well, Mr. Bernick, I think it's -- I  
25 think the issue could be handled if we ever get to a trust

1 distribution procedure by simply imposing the obligation, which  
2 is usually in the trust anyway, on the trustee to make sure  
3 that if an entity files a claim in more than one case, either  
4 present or future, that there is some recognition of that fact  
5 and attention paid to it.

6 MR. BERNICK: Very well, Your Honor.

7 THE COURT: So to the extent that the future claims  
8 rep is the future claims rep in more than one case, I think the  
9 obligations are to those "clients," future demand holders in  
10 each of those cases. But I think the potential for making sure  
11 that there isn't a double-dip that's inappropriate is still  
12 there and can be handled in the trust mechanism.

13 So any order that I'd enter that would appoint a  
14 futures rep in this case who also is a futures rep in another  
15 case is going to be conditioned on the fact that there will be  
16 a procedure in the trust distribution process to fix this.

17 MR. BERNICK: Well, and it was right that  
18 incorporated -- or at least some reference to it incorporated  
19 in the order appointing the futures representative in this  
20 case?

21 THE COURT: I don't know that it's necessary in this  
22 order, because we're not to the place --

23 MR. BERNICK: We're not there yet.

24 THE COURT: -- where you've got a trust. I just --

25 MR. BECKER: Yes.

1           THE COURT: -- I'm sure your memory will be good  
2 enough to --

3           MR. BERNICK: Okay.

4           THE COURT: -- recollect this discussion.

5           MR. BERNICK: Two other legal issues that have been  
6 raised and then a suggestion by the debtor about the three that  
7 have been proposed. The second legal issue is raised by one of  
8 the insurance companies. They filed a limited objection that  
9 ended up going for 40 pages.

10          And basically, the objection reduces the proposition  
11 that we have to litigate the merits of who really has a futures  
12 claim. Then we're going to decide who all represents or who  
13 all is the constituency represented by the futures  
14 representative before we ever get to appointing a futures  
15 representative.

16          And obviously, in our view this puts the cart before  
17 the horse. The whole idea is to have a representative that can  
18 participate in these cases for the purposes of litigating  
19 precisely those kinds of issues. So we ought to have a  
20 representative first, before we go to litigating, you know,  
21 whether the constituency that that representative serves  
22 includes people who are unimpaired or not.

23          I don't know of any precedence for this kind of  
24 proposal. Counsel called me to talk about it and I had to be  
25 candid and say that I thought that the objection was a silly

1 one and I still believe that today. The third issue is raised  
2 by a couple of the different responses.

3           And the essence of this issue is that to be truly  
4 independent the futures representative must be independently  
5 appointed. And by independently appointed we're really talking  
6 about a process that as is described would be pure as the  
7 driven snow.

8           The suggestion that's actually made is that the U.S.  
9 Trustee, who is not a party -- not an interested party in the  
10 sense of the other constituencies in the case, although through  
11 the appointment, the U.S. Trustee has filed what I thought was  
12 a very clear brief that first of all said that the U.S. Trustee  
13 does not have the statutory power to fulfill that function, and  
14 secondly, then went on to analyze really whether there was a  
15 conflict at all and found that there was not.

16           So the U.S. Trustee cannot serve in that role, but it  
17 is our view, it is the debtor's view, that we don't have to  
18 look far for how to insure independence here. The whole  
19 purpose of making an application and having the Court make the  
20 appointment, we don't appoint anybody.

21           We're simply making candidates -- suggestions for who  
22 the candidates might be, and the input of other parties is for  
23 precisely the same kind of purpose. It is ultimately Your  
24 Honor's order of appointment that is the governing document and  
25 is the governing decision.

1           And because it's the Court who makes the appointment,  
2 the process is an independent one, and the representative is an  
3 independent one. And that is the practice that's been followed  
4 in each and every one of the cases that I am familiar with. So  
5 we believe that the process is one that's sound, doesn't have  
6 to become overly elaborate.

7           It is interesting to us that the London Market goes  
8 on at length about how this whole process should be followed  
9 and then they conclude their brief by saying, oh, but guess  
10 what, David Austern (phonetic) is okay with us. So if Austern  
11 is okay with the London Market, presumably, they don't have a  
12 problem with the procedures that were used to suggest him.

13           That then brings me back to the three candidates.  
14 We've been diligent, Your Honor, I think in polling all the  
15 constituencies, finding out their views. I think that no one  
16 has quarreled with the three that we have proposed in the sense  
17 that there is some other more preeminently qualified candidate.

18           The only objection that I see to Mr. Austern comes  
19 from the asbestos claimants' committee. And you know, we  
20 obviously respect their views. That's why we solicited them.  
21 I'll note, however, that they did not have objection to Mr.  
22 Austern in connection with the ACE case. So I'm a little bit  
23 curious about why they would object now.

24           But we actually believe that in light of all the  
25 briefing that's occurred it probably does make the most sense

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1 to appoint Mr. Austern. He does not have any other engagements  
2 currently as an appointed futures representative. So to the  
3 extent that the debtor's voice does make a difference here, we  
4 think that that's probably the best choice.

5 THE COURT: All right. Who'd like to address the  
6 objection? Mr. Lockwood?

7 MR. LOCKWOOD: Your Honor, first, I think Mr. Bernick  
8 perhaps slightly overstates the ACC's position on Mr. Austern.  
9 I don't believe we filed an objection. I think we indicated to  
10 the Court our preference for Professor Green and I think that  
11 our preference for Professor Green ties in to one of the points  
12 that Mr. Bernick and Your Honor just discussed a few minutes  
13 ago about this notion that there's some kind of a conflict if  
14 you have a futures representative in more than one case.

15 I've read the papers that have been filed on this  
16 subject. I'm not aware of anybody who has described in  
17 intelligible terms what the supposed conflict is here. I mean,  
18 the futures representative in the Grace case is out to look  
19 after and make sure that the present and future claimants of  
20 the Grace estate are treated substantially the same in whatever  
21 trust mechanism may come into existence.

22 What possible conflict that duty could have with the  
23 service as a futures representative in the Federal Mogul case  
24 or the Armstrong case or the Owens Corning case is an absolute  
25 mystery to me. This -- the only suggestion that I've heard

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1 today is some sort of double-dipping issue.

2 That to me is unintelligible because what the issues  
3 are in these cases is the several liability. This is not the  
4 tort system. We don't come in here attempting to impose on the  
5 Grace estate or any of the other estates in these, some sort of  
6 joint liability the way one would have in the tort system with  
7 the possibility that, therefore, a debtor could wind up somehow  
8 or another picking up the share of some other entity here.

9 And the TDPs, to the extent that they come into  
10 existence in these cases, are quite explicit that what you are  
11 being compensated for is the several liability of that debtor  
12 and the TDP will not pay or listen to or entertain any notion  
13 that somehow or another there's some joint liability here that  
14 this trust ought to be responsible for.

15 So to me, it makes no sense, and indeed, it actually  
16 has the exact opposite result. The reason, quite candidly,  
17 that we have expressed a preference for Professor Green is  
18 precisely because it's our view that he is more experienced.  
19 The notion of going out and pulling somebody that has never had  
20 anything to do with asbestos torts and asbestos bankruptcies --  
21 I mean, Your Honor perhaps more than anybody else is aware that  
22 there is a learning curve in this area, and we believe that of  
23 the three candidates, none of whom, as I say, we have objected  
24 to as being unqualified or otherwise unacceptable, Professor  
25 Green has demonstrated the most experience and the broadest

1 range of activity in these cases.

2           Dean Trafalat (phonetic) is a close second. David  
3 Austern is a fine fellow and -- but he's only had one pre-pack  
4 that he's been involved with, which by hypothesis didn't deal  
5 with the kind of negotiations and interplay that some of these  
6 other more contested cases, the regular filings are.

7           And his other involvement has been on the claims  
8 handling side through his association with the Manville Trust,  
9 which is a somewhat different role than a futures  
10 representative who is an advocate. So that's our -- the  
11 committee's view on the candidates.

12           This point that Mr. Bernick said about the insurer  
13 statement of the need for -- oh, and by the way, I might add  
14 one final comment before I get away. The -- Your Honor's  
15 absolutely correct. It seems to me if there's a notion that  
16 somehow or another there's a conflict between futures reps, I  
17 don't know where you draw the line.

18           I mean, how do you represent multiple debtors that  
19 might have claims against -- in these asbestos bankruptcies  
20 everybody's got contribution claims against everybody else, as  
21 Your Honor is familiar with. The unsecured creditors'  
22 committee, the Stroock firm in this case, is also counsel to  
23 the unsecured creditors' committee in the USG case.

24           The -- Mr. Bayne's firm is counsel for the property  
25 damage committee in virtually every case in which a property

1 damage committee's been appointed. I mean, it just -- it's  
2 unprecedented and it makes no sense.

3 With respect to the -- this issue that somehow or  
4 another -- some of the insurers have raised -- that we need to  
5 have some sort of instruction or declaratory judgment from this  
6 Court telling the futures representative who he represents, to  
7 me is a giant red herring.

8 If you read the insurer's papers, what they're really  
9 asking for is a declaratory judgment that the present claimants  
10 and future claimants, both of them, if they are "unimpaired,"  
11 to use the insurer's favorite undefined term, undefined only  
12 whenever it suits their convenience, they want this Court right  
13 now, under the guise of instructing a futures rep, who its  
14 constituency is to disallow claims by persons who would not  
15 meet their definition of an unimpaired claimant.

16 And they want to litigate that issue, which  
17 Mr. Bernick has been eagerly awaiting Judge Wolin's permission  
18 to litigate for some number of years now, they want to litigate  
19 that issue in the connection with the employment of a futures  
20 representative.

21 THE COURT: Yeah. I think Mr. Bernick's right. That  
22 simply puts the cart before the horse. We need to get the  
23 futures rep in place, and then I believe it's up to the futures  
24 rep to decide what position, if any, to take if litigation  
25 actually comes up.

1           But I can't define who the future demand holders are  
2 going to be at this point in time. That's why they're future  
3 demand holders. Otherwise, they'd be current claimants and --

4           MR. LOCKWOOD: Well, it's even more difficult than  
5 that, because the futures representative is the mirror image,  
6 if you will, of the committee as it relates to the present  
7 claimants. He represents everybody. What they're basically  
8 trying to say is that the futures rep should decide that he  
9 isn't going to take the position for future claimants that  
10 people who have plural diseases in the future, for example, and  
11 who the asbestos claimants' committee are asserting have claims  
12 in the present, they shouldn't get compensated in the present,  
13 which by hypothesis means they wouldn't get compensated in the  
14 future.

15           THE COURT: Well, I suppose it --

16           MR. LOCKWOOD: So in effect, what they're asking is  
17 the futures rep should decide in lieu of this Court that the  
18 future plural claimants don't have a claim.

19           THE COURT: No. I think the way to do it is if  
20 somebody raises the issue, if it's raised and if it's permitted  
21 to go forward to litigation, I would assume that the futures  
22 rep's going to take a position, because I think whatever ruling  
23 comes down in a case on a case by case basis that binds the  
24 present is going to bind the futures, because otherwise, you  
25 can't get parity in the distribution mechanisms.

1                   MR. LOCKWOOD: Exactly, Your Honor. I mean, the goal  
2 of the futures rep, the role of the futures rep is to make sure  
3 that his constituents get treated in substantially the same  
4 manner on similar claims.

5                   THE COURT: That's right.

6                   MR. LOCKWOOD: Not for him to cherry pick his  
7 constituency and decide which among them gets paid and which  
8 doesn't. Thank you, Your Honor.

9                   THE COURT: This is kind of the flip side of the  
10 issue we saw in a different case about the fact that there was  
11 an argument that the futures representative could not represent  
12 all of the futures demand holders, that we need a different  
13 futures rep for different classifications of demand holders,  
14 and I don't think that argument makes any sense, either,  
15 according to the statute, so. Good afternoon.

16                  MR. SAKALO: Good afternoon, Your Honor. Jay Sakalo,  
17 on behalf of the asbestos property damage committee. A couple  
18 of points I want to address that were raised by Mr. Bernick and  
19 that Mr. Lockwood addressed, and I think Mr. Bernick addressed  
20 with respect to the learning curve that a new candidate, unlike  
21 Mr. Austern, Mr. Green and Mr. Trafalat, would face in being  
22 appointed as a futures rep in this case, really, I think speaks  
23 to the validity of having a new person other than one of those  
24 three candidates appointed.

25                  THE COURT: Well, who do you want in?

1 MR. SAKALO: Oh, we have not come up with a  
2 candidate's name, Your Honor, because we don't believe that we  
3 should be advocating a particular person as the candidate to  
4 serve as a future claimants' rep.

5 THE COURT: Well, are you advocating against the  
6 three that have been selected by the various constituents here?

7 MR. SAKALO: Yes. We don't believe that any of the  
8 three have the proper -- not -- they're qualified in respect of  
9 their ability to serve. However, we believe that given that  
10 they have served or are currently serving as a future  
11 claimants' rep in other asbestos cases, they should not be  
12 appointed in these cases.

13 THE COURT: So you're going to tell me that I  
14 shouldn't appoint the three who have been proposed, even though  
15 they're qualified, but I should just go out and pick the next  
16 common man on the street and pull him in and have him be the  
17 futures rep?

18 MR. SAKALO: Well, it's not the common man on the  
19 street. We believe that the future claimants --

20 THE COURT: It is to me, if you're not going to give  
21 me a recommendation. I don't have -- I don't know  
22 qualifications of people who sit in various capacities and  
23 things.

24 MR. SAKALO: Well, I think a process can be  
25 established where we can provide names to you on an anonymous

1 basis. So nobody knows if it's a proposed nominee of the  
2 property damage committee, personal injury committee, the  
3 debtor's.

4 THE COURT: But it's the debtor's obligation under  
5 the statute, isn't it?

6 MR. SAKALO: It's the Court's obligation to a point.  
7 Now, the debtors raise in their papers that they have the right  
8 under 327 to nominate professionals.

9 THE COURT: I think they do.

10 MR. SAKALO: But are you -- I'm not in agreement that  
11 the future claimants' rep is a professional.

12 THE COURT: The future claims representative, I  
13 suppose, is the representative. He stands in the capacity of  
14 the future demand holders and can seek appointment through the  
15 Court for his own professionals.

16 MR. SAKALO: Correct, and they would be professionals  
17 and they would be subject to --

18 THE COURT: But he has to be appointed under 524, and  
19 the only mechanism for appointing somebody that I know of is as  
20 a professional. So for purposes of this appointment process I  
21 think he's treated as though he were a professional, even  
22 though he's going to have the status of a party.

23 MR. BERNICK: Mr. Sakalo, maybe I could make a small  
24 suggestion that might expedite this. In terms of your  
25 constituency -- and I think this is correct, Your Honor, if my

1 memory serves -- Mr. Austern acted as the futures  
2 representative in CEABB (phonetic) and there were no property  
3 damage claims that were at issue in that case.

4           So if the concern is that he's already served and  
5 he's already somehow framed his views -- if we can agree is the  
6 subject here -- I don't think that that applies to Mr. Austern.  
7 Matter of fact, if I read Mr. Lockwood's comments, I think his  
8 point, the papers did not actually say, we object, or there  
9 wasn't a formal objection.

10           Maybe if we can just focus on Mr. Austern, their  
11 concerns really don't have application to Mr. Austern. That  
12 would also pick up the London Market, who apparently think that  
13 Mr. Austern is okay, which I guess the only issue will be  
14 Federal over there.

15           THE COURT: All right.

16           MR. SAKALO: Well, it appears, in fact, Mr. Bernick,  
17 our concern with Mr. Austern is not that there were no claims  
18 in CE for property damage. Our concern with Mr. Austern is  
19 that there were personal injury claims in CE. That was all  
20 that case is about, and we have a concern that in this case he  
21 comes to the table with an understanding of personal injury  
22 claims, future claims, future demands, however they might be  
23 characterized.

24           We believe that somebody who needs to get up this  
25 learning curve is the appropriate person, because they need to

1 be educated by themselves and by their professionals. We're at  
2 a point in this case, and we'll hear it a little bit later when  
3 we deal with exclusivity, there's not a plan on the table.

4           There's not a plan proposed to our committee or to  
5 the PI committee as we understand it. There's ample time for a  
6 professional or for a future claimants' rep to be appointed and  
7 get up the learning curve. They speak of these complex issues  
8 that can't be learned in such a quick manner; it would cost too  
9 much.

10           THE COURT: Are you sure you want to pursue this,  
11 because honestly, if this is an issue that's going to come up,  
12 the next time there's a property damage claim I'm going to  
13 expect that the committees' representatives are going to be  
14 somebody who has absolutely no understanding of property damage  
15 claims and can hit the ground unrunning, crawling and relying  
16 on their own professionals, who likewise have no understanding  
17 of what current property damage claims are.

18           I mean, this is an absurd argument to me, that this  
19 is -- they should have to incur so much additional expense to  
20 try to get somebody up and running when there are qualified  
21 people who -- if they have a conflict that's a different issue.  
22 But unless I'm hearing something about an actual conflict, this  
23 same argument applies to every single committee and its  
24 professionals.

25           MR. SAKALO: It does, except, Your Honor, there's one

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1 difference, and that is, we're assuming that they're up the  
2 learning curve because they understand asbestos personal injury  
3 issues. As to each debtor those issues are different. For  
4 instance, Grace has issues related to its product.

5 It has certain defenses that it will raise to its  
6 products that other debtors won't raise. USG has defenses that  
7 they will raise.

8 THE COURT: Well, if that's the case --

9 MR. SAKALO: Both --

10 THE COURT: -- then the futures rep really isn't up  
11 and running because he has to learn the specific facts of every  
12 case.

13 MR. SAKALO: And that's my point, Your Honor. Mr.  
14 Austern, Mr. Green and Mr. Trafalat, as it relates to Grace's  
15 products and Grace's claims, no further up the learning curve  
16 than another representative who would be appointed.

17 THE COURT: I can't agree with that. I mean, that's  
18 the same thing putting it into the property damage committee as  
19 saying that you don't understand what the global context of the  
20 issues are, even though they may apply differently to the  
21 specific facts of the case.

22 It's exactly the same argument that applies with  
23 respect to every counsel, and I really think you should assess  
24 whether this is an argument you want to pursue, because if I  
25 buy this argument it will apply in the future to any case in

1 which I'm assigned and as to which I don't yet have committees  
2 appointed, so.

3 MR. SAKALO: I --

4 THE COURT: Because I think I'd be untrue to myself  
5 if I said, well, it applies in this instance and not in all  
6 others. If it's an argument that holds water here, it's  
7 meritorious for everybody in all contexts in these asbestos  
8 cases.

9 MR. SAKALO: Thank you, Your Honor.

10 THE COURT: Good afternoon.

11 MR. J. COHN: Good afternoon, Your Honor. Jacob  
12 Cohn, Cozen, O'Connor, for Federal Insurance Company.

13 Mr. Bernick has essentially, perhaps implicitly, perhaps not  
14 implicitly, accused us of trying to make hay with the Judge  
15 Wolin situation. You'll not find any reference to that in our  
16 briefs.

17 The case does stand for a central proposition,  
18 though. That is that structure matters. Structure is  
19 important. It's fundamental to binding future claimants. And  
20 it's not any kind of process that's the most convenient to give  
21 to the arms of future claimants.

22 It's the best practicable under all reasonable  
23 circumstances that you could give to them. And the problem  
24 with 327, nowhere does it say that under 327 the debtors have  
25 the right to nominate an FCR.

1           THE COURT: Regardless of who does it, how's it going  
2 to come up if it doesn't come from the debtor, since the debtor  
3 has the --

4           MR. J. COHN: Any party in interest --

5           THE COURT: -- fiduciary obligation to all creditors.  
6 And --

7           MR. J. COHN: -- any party in interest should --

8           THE COURT: -- if seeking in a 524(g) injunction to  
9 the future demand holders, who else has that obligation prior  
10 to the appointment of an FCR?

11          MR. J. COHN: Any party in interest or the Court sua  
12 sponte should be a --

13          THE COURT: Absolutely not. An insurance company has  
14 no standing whatsoever to deal with a future claims  
15 representative.

16          MR. J. COHN: Your Honor, the -- this is one section  
17 of the code where you're going to find insurance companies'  
18 names. And if I showed up here a year from now and --

19          THE COURT: In --

20          MR. J. COHN: -- raised these issues, you'd say,  
21 where were you a year ago when we started down this road.

22          THE COURT: -- in 327 for how to get professionals  
23 appointed in the estate, insurance companies are named?

24          MR. J. COHN: These are -- this is not a professional  
25 for the estate, Your Honor. This is a constituency

1 representative. This is somebody without a principal. That's  
2 the fundamental distinction between 327, where you are hiring a  
3 professional to work for somebody who's there, well, they don't  
4 like other to look and say, Your Honor, fire this professional;  
5 discipline this professional. You're hiring the person to be  
6 the constituency.

7 THE COURT: Yeah, I agree with that.

8 MR. J. COHN: And when you're doing that, in all  
9 other contexts that we are aware of that are analogous, the  
10 courts require an appearance of impropriety standard. If you  
11 look to UNR, if you look to Johns Manville, and I suggest to  
12 Your Honor that those two courts, those two "pioneering cases"  
13 that are referred to by Congress when they enact 524(g) and  
14 (h), provide legislative gloss to the interpretation of these  
15 statutes.

16 The House of Representatives said, we want to make  
17 sure that these future cases meet the same kind of high  
18 standards with respect to consideration of these future  
19 claimants.

20 THE COURT: I haven't seen anything in any of the  
21 papers that challenge either Professor Green or Mr. Trafalat or  
22 Mr. Austern's high standards in the case.

23 MR. J. COHN: Structure matters, Your Honor. It's  
24 the highest standards of the structure.

25 THE COURT: It does indeed. I'm going to appoint

1 somebody. There will be a structure.

2 MR. J. COHN: The structure of permitting the  
3 conflicted constituencies to say, hire somebody to be --

4 THE COURT: Who's conflicted?

5 MR. J. COHN: -- my arm's-length partisan is a  
6 structural effect.

7 THE COURT: Wait. Who's conflicted? Who is it who's  
8 conflicted?

9 MR. J. COHN: Who is conflicted vis-à-vis the futures  
10 representative? The debtor, the insurers, the other creditors,  
11 everybody --

12 THE COURT: The debtor is absolutely not conflict --

13 MR. J. COHN: -- that is a real party in interest has  
14 a different --

15 THE COURT: No. The debtor is absolutely not  
16 conflicted with respect to the FCR or the ACC or the trade  
17 committee or any other --

18 MR. J. COHN: Ambatex (phonetic) says to the  
19 contrary, Your Honor.

20 THE COURT: -- or any other creditor in the case.  
21 The debtor has a fiduciary obligation property damage on -- to  
22 make sure that all of those constituencies are appropriately  
23 treated within the case. It doesn't represent those entities,  
24 but it is not a conflict in the sense that you're now arguing  
25 that there's a conflict. It has a fiduciary duty. How can it

1 be in conflict?

2 MR. J. COHN: Well, Your Honor, Ambatex holds flatly  
3 to the contrary.

4 THE COURT: Ambatex is not a bankruptcy case.

5 MR. J. COHN: Your Honor, Ambatex certainly is a  
6 bankruptcy case. It is part of the judicial gloss of --  
7 legislative gloss of 524(g). Ambatex is the law of this  
8 Circuit.

9 THE COURT: Oh, I'm sorry. I apologize. I was  
10 thinking of the Supreme Court case, now the name has escaped  
11 me.

12 MR. J. COHN: Amkit (phonetic).

13 THE COURT: Yes. Thank you. I apologize. I had the  
14 wrong case.

15 MR. J. COHN: Ambatex, Ambatex, 7055 F.2d.

16 THE COURT: Yeah.

17 MR. J. COHN: Whatever it is.

18 THE COURT: Sorry.

19 MR. J. COHN: Is what I'm referring to.

20 THE COURT: Okay.

21 MR. J. COHN: This is the law of the Circuit, and it  
22 says the debtors can't look out for the interests of the  
23 futures because they have a conflicting interest. Johns  
24 Manville says that.

25 THE COURT: They can't look out for them, but with

1 respect to who's going to bring a motion to get somebody  
2 appointed to represent them, they have no conflict. They have  
3 a fiduciary duty to make sure that the case is structured in a  
4 way that all creditors and demand holders' interests are  
5 appropriately met.

6 MR. J. COHN: I suggest to you that a structure that  
7 permits any of these conflicted constituencies to propose  
8 somebody, to vet somebody, to nominate a particular person is  
9 in and of itself --

10 THE COURT: Right. And then I'll ask you the same  
11 question I'll ask them.

12 MR. J. COHN: -- structurally unconstitutional.

13 THE COURT: Am I to go out on the street and pull the  
14 first person I see and pull them in as the futures rep?

15 MR. J. COHN: No. Your Honor, you're to fix the  
16 structure. If the structure were to be fixed.

17 THE COURT: I have fixed one. I instructed the  
18 debtor to talk with the constituents and figure out who an  
19 appropriate futures rep would be and --

20 MR. J. COHN: That's the structural problem, Your  
21 Honor.

22 THE COURT: -- and then to make recommendations, and  
23 if they didn't agree, to propose names. I don't know whose  
24 names any of these three people were proposed by.

25 MR. J. COHN: And I --

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1 THE COURT: I don't see that as a structural problem.

2 MR. J. COHN: -- my problem, Your Honor, is that --

3 THE COURT: I see it as a main --

4 MR. J. COHN: -- the conflicted constituencies,

5 certain of whom repeat in other bankruptcies, are permitted

6 under the structure --

7 THE COURT: They are not conflicted.

8 MR. J. COHN: -- Your Honor allows to have in place,  
9 contrary to UNR and contrary to Manville.

10 THE COURT: They are not conflicted. Please stop  
11 referring them -- to them in that fashion. They are different  
12 constituent parties. With respect to the debtor, in making a  
13 motion to appoint a futures rep the debtor is not conflicted.  
14 The debtor does not represent the futures rep.

15 It is only assuring that future demand holders have a  
16 representative. That is not a conflict and I don't want to  
17 hear that anymore in this record. That can be your position.  
18 It's not mine. So please, I'm making a finding.

19 MR. J. COHN: I suggest to you --

20 THE COURT: There is no conflict.

21 MR. J. COHN: -- Your Honor, that to answer your  
22 follow-up question of who do I pick --

23 THE COURT: Okay.

24 MR. J. COHN: -- that if you fix the structure such  
25 that a party in interest may say, Your Honor, please select a

1 futures rep and put one in place it may not nominate or vet,  
2 that would take care of the substantial bulk of my problem with  
3 repeat performers.

4 THE COURT: And I've just said that if they can't  
5 nominate or vet how am I to find out who the persons are or  
6 what their qualifications are? Am I to go out on the street  
7 and pull the first person in and say, hey, you want to be a  
8 futures rep?

9 MR. J. COHN: My suggestion on behalf of my clients  
10 is that you permit the trustee an exclusive period to give you  
11 some names.

12 THE COURT: I don't have a trustee in this case.

13 MR. J. COHN: The U.S. Trustee; I'm sorry.

14 THE COURT: I have the debtor. They stand in the  
15 position of a trustee in the case.

16 MR. J. COHN: The U.S. Trustee; I mis-spoke.

17 THE COURT: Absolutely not. They've already told me  
18 they can't do it by statute.

19 MR. J. COHN: Well, is it practicable for the Court  
20 to do this? The question is --

21 THE COURT: To order the Department of Justice to do  
22 something --

23 MR. J. COHN: -- is it practicable?

24 THE COURT: -- that it's said that it can't do by  
25 statute? I don't think so.

1 MR. J. COHN: No. No. No, not the U.S. Trustee.

2 Unless you can say under the circumstances it is not  
3 practicable to give them that level of --

4 THE COURT: It's not legal.

5 MR. J. COHN: -- official protection.

6 THE COURT: It's not only not practicable, it's not  
7 legal.

8 MR. J. COHN: Not the U.S. Trustee, Your Honor.

9 THE COURT: Who?

10 MR. J. COHN: The Court.

11 THE COURT: Wait a minute. You just said I should  
12 make the U.S. Trustee give me representation.

13 MR. J. COHN: That's my suggestion to make it easier.  
14 The U.S. Trustee won't, and the Court doesn't want to do it,  
15 then --

16 THE COURT: Fine. Now, I'm back to the same question  
17 I've asked five times: how do I do it? Do I go out onto the  
18 street and pull somebody in and say, hey, do you want to be a  
19 future claims representative? Is that how I do it?

20 MR. J. COHN: Or you put out an RFP.

21 THE COURT: I think the structure is perfectly well  
22 defined in prior cases. This is not the first asbestos case  
23 that's come up in which an FCR has been nominated by the  
24 debtor; that has never been an issue; that has been, as far as  
25 I know, addressed by the courts in a fashion that says the

1 debtor has a conflict in making a nomination.

2           If the parties are unhappy with the nominations I get  
3 objections to them. If they were not qualified, I agree, that  
4 would be an inappropriate thing. But I don't see anything in  
5 anybody's papers that say these gentlemen are not qualified.  
6 And I can't see how they have conflicts if they are in fact  
7 future claims reps in other cases, because their duties are the  
8 same in each case, but their constituency is different.

9           That's no different from one law firm representing a  
10 -- you know -- a client in one case and a different client in a  
11 different case, and the two may have competing interests in  
12 some third case. I mean, that doesn't stop the law firm from  
13 standing in the shoes or getting a power of attorney or  
14 something to act.

15           MR. J. COHN: Well, it may, exactly, because a law  
16 firm may get a waiver, a conflict waiver. You can't get a  
17 conflict waiver from an absent future claimant.

18           THE COURT: There is no conflict. I don't need a  
19 conflict waiver. Where is there a conflict?

20           MR. J. COHN: There's an appearance of impropriety in  
21 people turning the FCR --

22           THE COURT: As to who?

23           MR. J. COHN: -- position into a cottage industry.  
24 Their employment depends upon their being nominated by people  
25 that are representative of constituencies that are in conflict

1 with the constituencies they're being asked to represent. It's  
2 not an arm's-length transaction.

3 THE COURT: Well, I can't -- I just -- in this  
4 instance, I just can't see that. I really just can't see it.  
5 I would be happy -- if there were some additional future claims  
6 representative nominees in cases coming up, I think it wouldn't  
7 be inappropriate to have a wider variety to choose from, but in  
8 this instance I've got three very highly qualified individuals  
9 who have been nominated by somebody.

10 I know they've come up by the debtor's motion. I  
11 understood Mr. Bernick to say that the constituents were  
12 consulted. I don't know who proposed these names. I know I'm  
13 getting them in the motion, and I have no challenge to the  
14 qualifications.

15 I don't see an appearance of a conflict. I don't see  
16 that these gentlemen are representing, for example, the present  
17 asbestos constituents in one case. If that were the case I may  
18 see a conflict, but to the extent that they're standing as FCRs  
19 in each case, I don't see that as a conflict.

20 MR. J. COHN: We respectfully disagree. If I may  
21 turn to the second issue, which is, again, one that you have  
22 indicated you don't agree with us on, which is whether or not  
23 you need to define the constituency of the FCR up front.

24 THE COURT: I will.

25 MR. J. COHN: And the question --

1           THE COURT: I will do that. My definition of the  
2 FCR's constituency up front is all future demand holders,  
3 period, who have some asbestos-related disease. Period. End  
4 of story. It's for him to determine whether there is a claim  
5 on which to base some representation in the future, but in  
6 terms of who his constituents are, everybody and anybody who  
7 contends that they have an asbestos-related injury that has not  
8 yet manifested itself is his constituency.

9           MR. J. COHN: I suggest to Your Honor that the  
10 question that the Frenville court left open in 1984, which was  
11 a very good question then, is a compelling question today:  
12 what is the law that governs whether or not somebody has a  
13 presently compensable claim in bankruptcy.

14           THE COURT: That is an issue I do not need to figure  
15 out today.

16           MR. J. COHN: I -- I --

17           THE COURT: Whether it's presently compensable. All  
18 I need to know is, if it's presently compensable, then it's not  
19 the future demand holders' constituency. If the claim is known  
20 now so that it is compensable and allowable in bankruptcy, it's  
21 not his constituency.

22           MR. J. COHN: Your Honor, one of the fundamental  
23 problems that the Ortiz court had in reversing, again, the  
24 settlement that Professor Green approved in the asbestos  
25 litigation --

1 THE COURT: Um-hmm.

2 MR. J. COHN: -- was that the District Court took no  
3 steps at the outset to insure that the potentially conflicting  
4 interests of easily identifiable characters of claimants be  
5 protected by provisional certification of subclasses, relying  
6 instead on its post-hoc findings at the fairness hearing that  
7 these subclasses in fact had been adequately represented.

8 THE COURT: This isn't a class certification issue.  
9 This is an issue that Congress -- if anything, Congress in 524  
10 has I think disagreed with that type of analysis in Ortiz,  
11 because 524 doesn't provide for different future claims  
12 representatives based on the type of disease or the  
13 classification of disease that an asbestos holder chooses to  
14 raise.

15 It simply defines an entity that will represent  
16 future demand holders. That's Congress. This argument, I  
17 think you need to take to Congress.

18 MR. J. COHN: Two things, if I may. First of all,  
19 Congress legislates subject to the due process clause. And  
20 we're talking about adequate representation because of due  
21 process, and the bankruptcy power exists on the constitutional  
22 plane along with and subject to the Fifth Amendment.

23 THE COURT: When was Ortiz decided?

24 MR. J. COHN: 1999, Your Honor.

25 THE COURT: Okay.

1           MR. J. COHN: But the problem becomes, how is a  
2 future representative to represent his constituency if he  
3 doesn't know the applicable law? Now, Mr. Bernick --

4           THE COURT: Well, oh, no, wait. Nobody has said that  
5 Mr. Austern, Mr. Green or Mr. Trafalat can't figure out the  
6 applicable law. I haven't seen an argument raised about that  
7 or can't hire professionals who will assist them in figuring  
8 out the applicable law.

9           MR. J. COHN: Nobody can answer the question left  
10 open under Frenville by the court.

11          THE COURT: I have answered it. This constituency  
12 for the FCR will be all future demand holders who claim  
13 exposure to or asbestos injury, just like that's what the ACC  
14 has for the presence.

15          MR. J. COHN: Damage with a compensable claim under  
16 the law of the several states, or under federal common law?

17          THE COURT: That's an issue that will be determined  
18 when the claims resolution mechanisms get put in place. That's  
19 exactly why those future demand holders need a representative.

20          MR. J. COHN: Well, if asymptomatic people are to be  
21 treated as having compensable claims or not compensable claims  
22 under state law, some of them will, some of them won't. And if  
23 they're all considered under federal law, there'll be a rule.  
24 and I have abdicated a rule that they don't.

25          Now, if they're not voting creditors, what the FCR

1 needs to advocate for is a different body of people, and the  
2 concessions they will have to make is different. Is it facing  
3 being swamped by --

4 THE COURT: I can't address that issue.

5 MR. J. COHN: -- voting asymptomatic putative  
6 creditors?

7 THE COURT: But I can't address that issue unless and  
8 until there is a resolution as to whether the asbestos, as you  
9 call them, asymptomatic asbestos plaintiffs have claims that  
10 are allowable and that entitle them to vote. I can't know  
11 that. The issue is going to follow on for the future claims  
12 rep exactly as it gets determined for the presence.

13 MR. J. COHN: And I suggest to you, Your Honor, that  
14 it can be decided now. It needs to be decided now or the --

15 THE COURT: How can I? There's --

16 MR. J. COHN: -- zealous advocacy of an FCR is  
17 fatally compromised.

18 THE COURT: And who's going to represent these  
19 alleged asymptomatic people in this litigation when they don't  
20 have a representative? That's a good way to get a default  
21 order against them all, and an equally good way not to have  
22 that order worth the paper it's printed on.

23 MR. J. COHN: Well, if --

24 THE COURT: Because they won't have an asbestos  
25 representative.

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1 MR. J. COHN: -- if the federal -- if the bankruptcy  
2 law is that it is federal common law, that it is a federal  
3 bankruptcy law rule that functionally unimpaired people don't  
4 have currently compensable claims in bankruptcy, a pure legal  
5 question, then their putative interests as potential future  
6 demand holders is -- it is represented by the FCR.

7 THE COURT: Yeah.

8 MR. J. COHN: Now, the answer is --

9 THE COURT: That's right. If I have an FCR in place,  
10 I agree it's representative.

11 MR. J. COHN: But to FCR means a split.

12 THE COURT: If I don't have an FCR in place, there's  
13 nobody there.

14 MR. J. COHN: The FCR, if you pluck him out of thin  
15 air, if you pull him off the street, if you hire one of the  
16 nominees, you have to give him a script. You have to say, this  
17 is the character you're playing.

18 THE COURT: I've said, who -- what character he's  
19 playing. He represents all future asbestos demand holders.

20 MR. J. COHN: Yeah, but that character you haven't  
21 defined.

22 THE COURT: I have defined it.

23 MR. J. COHN: Well, who are they?

24 THE COURT: I've done it at least five times on this  
25 record.

1 MR. BERNICK: Your Honor, if I can make a suggestion.  
2 Mr. Cohn's arguments are interesting. They're all in his  
3 brief.

4 THE COURT: They are all in the brief, but  
5 everybody's are.

6 MR. BERNICK: Yeah, they're all in the brief. The  
7 limited objection is not a limited objection -- is an effort to  
8 dramatically revolutionize and change the way that  
9 representations take place. He's entitled to his opinion.  
10 He's offered his opinion.

11 He's now gone for much longer than anybody else  
12 that's spoken to this issue, and we are mindful that we have  
13 other items on the agenda this afternoon.

14 THE COURT: Well --

15 MR. BERNICK: And I'm very concerned about our  
16 ability to get done at 1:30.

17 THE COURT: I have read the brief. The arguments by  
18 all the parties have tracked the briefs, and frankly, I just  
19 can't agree with this position for the reasons I've already  
20 stated. And I have defined that term. This record stands for  
21 the definition of that term.

22 I am going to put a future claims representative in  
23 place. In the event that there is litigation concerning  
24 whether or not asymptomatic asbestos injury victims are or are  
25 not entitled to have a vote or hold a claim in this case, they

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1 will have a representative in the form of a future claims rep.

2               Otherwise, that litigation would not be binding on  
3 them, because at that point in time, you're quite correct, all  
4 of the cases would stand for the proposition that they were not  
5 represented, and therefore, can't be bound.

6               MR. J. COHN: If I may have a final thought, Your  
7 Honor.

8               THE COURT: Yes.

9               MR. J. COHN: By doing that, we contend that you set  
10 up an inherent conflict because you have asbestos futures that  
11 are going to be truly injured in the future.

12              THE COURT: Yes.

13              MR. J. COHN: And now, you're saying that their  
14 representative has also at this point in time to represent  
15 asymptomatic future claimants.

16              THE COURT: Yes, just like the ACC does it for  
17 presence, exactly. Their committee even consists of people who  
18 have different levels of diseases appointed by the United  
19 States Trustee.

20              MR. J. COHN: And --

21              THE COURT: Whom you would like to have appoint the  
22 futures rep.

23              MR. J. COHN: We take no position on that issue right  
24 now. Thank you, Your Honor.

25              THE COURT: I take a position on it. The Code says

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1 that they're to be treated similarly, and therefore, we're  
2 going to figure out a way to treat them similarly, whoever that  
3 "they" turn out to be in the long run.

4           Mr. Lockwood, I think at this point in time I'm  
5 inclined to grant the motion to appoint Mr. Austern, simply  
6 because I think at this point Mr. Austern is not actively  
7 involved as a futures rep. To the extent that there is some  
8 alleged appearance of impropriety, I don't think that  
9 appearance can be attached to him right now.

10          And for that reason, I think it would be simply  
11 better at this point to appoint Mr. Austern. That's not to  
12 have a negative as to Professor Green or Mr. Trafalat. They  
13 are both very highly respected people within the bankruptcy  
14 community. But I just think in this case at this time it's  
15 better to put Mr. Austern in place.

16          MR. LOCKWOOD: Your Honor, I obviously have no  
17 objection to that. My only comment is I really wish, if you're  
18 going to appoint Mr. Austern, you don't lend credence to the  
19 notion that Professor Green or Mr. Trafalat would have some  
20 sort of an appearance of conflict.

21          I think Mr. Bernick and I have addressed that at some  
22 length, and I frankly have yet to hear anybody else identify  
23 what the conflict is, other than its --

24          THE COURT: I don't see a conflict.

25          MR. LOCKWOOD: -- asymptomatic issues, so.

1           THE COURT: I don't see a conflict for those  
2 gentlemen. Nonetheless, to the extent that there is an issue,  
3 that there is some appearance of impropriety, it cannot attach  
4 to Mr. Austern, regardless of whether it could attach to Mr.  
5 Green or Mr. Trafalat, and I'm not finding that it does, just  
6 regardless of whether it does or doesn't.

7           It can't attach to Mr. Austern. Therefore, I will  
8 take an order that appoints Mr. Austern. Thank you.

9           MR. BERNICK: We did not fill in the name right  
10 there, Your Honor. It's blank as it's being tendered to you.

11          THE COURT: All right. I filled in Mr. Austern's  
12 name. Okay. That order is entered.

13          MR. BERNICK: Thank you, Your Honor. If we can, as I  
14 suggested at the outset, turn to item 11.

15          THE COURT: That's fine.

16          MR. BERNICK: Which is exclusivity. And I know Your  
17 Honor has read the briefs. There are some things, though, that  
18 I would like to add. They shouldn't take very long, and then  
19 we can hear from others. There's only one objection that's  
20 been made to the extension, and that's by Mr. Lockwood's  
21 client, the committee.

22          We have been at an impasse with the bodily injury  
23 claimants. We did meet with their representatives. We  
24 attempted to see if there was common ground to negotiate a  
25 consensual plan, and it has not materialized. We do not blame

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